

## § 1780.73

sources to permit reasonable competition consistent with the nature and requirements of the Procurement. The Request for Proposal shall be publicized and reasonable requests by other sources to compete shall be honored to the maximum extent practicable;

(2) The Request for Proposal shall identify all significant evaluation factors and their relative importance;

(3) The owner shall provide mechanisms for technical evaluation of the proposals received, determination of responsible offerors for the purpose of written or oral discussions, and selection for contract award; and

(4) Award may be made to the responsible offeror whose proposal will be most advantageous to the owner. Unsuccessful offerors should be promptly notified.

(d) *Noncompetitive negotiation.* Noncompetitive negotiation is procurement through solicitation of a proposal from only one source, or after solicitation of a number of sources, competition is determined inadequate. Noncompetitive negotiation may be used when the award of a contract is not feasible under small purchase or competitive sealed bids. Circumstances under which a contract may be awarded by noncompetitive negotiations are limited to the following:

(1) The item is available only from a single source; or

(2) There exists a public exigency or emergency and the urgency for the requirement will not permit a delay incident to competitive solicitation; or

(3) After solicitation of a number of sources, competition is determined inadequate; or

(4) No acceptable bids have been received after formal advertising; or

(5) The procurement is for professional services; or

(6) The aggregate amount does not exceed \$100,000.

## § 1780.73 [Reserved]

## § 1780.74 Contracts awarded prior to applications.

Owners awarding construction or other procurement contracts prior to filing an application, must provide evidence that is satisfactory to the Agency that the contract was entered into

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without intent to circumvent the requirements of Agency regulations.

(a) *Modifications.* The contract shall be modified to conform with the provisions of this part. Where this is not possible, modifications will be made to the extent practicable and, as a minimum, the contract must comply with all State and local laws and regulations as well as statutory requirements and executive orders related to the Agency financing. When all construction is complete and it is impracticable to modify the contracts, the owner must provide the certification required by paragraph (c) of this section.

(b) *Consultant's certification.* Provide a certification by an engineer, licensed in the State where the facility is constructed, that any construction performed complies fully with the plans and specifications.

(c) *Owner's certification.* Provide a certification by the owner that the contractor has complied with applicable statutory and executive requirements related to Agency financing for construction already performed.

## § 1780.75 Contract provisions.

In addition to provisions required for a valid and legally binding contract, any recipient of Agency funds shall include the following contract provisions in all contracts.

(a) *Remedies.* Contracts other than small purchases shall contain provisions or conditions which will allow for administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as may be appropriate. A realistic liquidated damage provision should be included in all contracts for construction.

(b) *Termination.* All contracts exceeding \$10,000, shall contain suitable provisions for termination by the owner including the manner by which it will be effected and the basis for settlement. In addition, such contracts shall describe conditions under which the contract may be terminated for default as well as conditions where the contract may be terminated because of circumstances beyond the control of the contractor.

(c) *Surety*. In all contracts for construction or facility improvements exceeding \$100,000, the owner shall require bonds or cash deposit in escrow assuring performance and payment each in the amount of 100 percent of the contract cost. The surety will be in the form of performance bonds and payment bonds. For contracts of lesser amounts, the owner may require surety. When a surety is not provided, contractors will furnish evidence of payment in full for all materials, labor, and any other items procured under the contract. Form RD 1924-10, "Release by Claimants," and Form RD 1924-9, "Certificate of Contractor's Release," may be used for this purpose. Companies providing performance bonds and payment bonds must hold a certificate of authority as an acceptable surety on Federal bonds as listed in Treasury Circular 570 as amended and the surety must be listed as having a license to do business in the State where the facility is located.

(d) *Equal employment opportunity*. All contracts awarded in excess of \$10,000 by owners shall contain a provision requiring compliance with Executive Order 11246 (3 CFR, 1966 Comp., p.339), entitled, "Equal Employment Opportunity," as amended by Executive Order 11375 (3 CFR, 1968 Comp., p. 321), and as supplemented by Department of Labor regulations 41 CFR chapter 60.

(e) *Anti-kickback*. All contracts for construction shall include a provision for compliance with the Copeland "Anti-Kickback" Act (18 U.S.C. 874). This Act provides that each contractor shall be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which they are otherwise entitled. The owner shall report suspected or reported violations to the Agency.

(f) *Records*. All negotiated contracts (except those of \$10,000 or less) awarded by owners shall include a provision to the effect that the owner, the Agency, the Comptroller General of the United States, or any of their duly authorized representatives, shall have access to any books, documents, papers, and records of the contractor which are directly pertinent to a specific Federal

loan or grant program for the purpose of making audits, examinations, excerpts, and transcriptions. Owners shall require contractors to maintain all required records for 3 years after making final payment and all other pending matters are closed.

(g) *State energy conservation plan*. Contracts shall incorporate mandatory standards and policies relating to energy efficiency which are contained in the State energy conservation plan issued in compliance with the Energy Policy and Conservation Act (42 U.S.C. 6201).

(h) *Change orders*. The construction contract shall require that all contract change orders be concurred in by the Agency.

(i) *Agency concurrence*. All contracts must contain a provision that they shall not be effective unless and until the State program official or designee concurs in writing.

(j) *Retainage*. All construction contracts shall contain adequate provisions for retainage. No payments will be made that would deplete the retainage nor place in escrow any funds that are required for retainage nor invest the retainage for the benefit of the contractor. The retainage shall not be less than an amount equal to 5 percent of an approved partial payment estimate until the project is substantially complete and accepted by the owner, consulting engineer and Agency. The contract must provide that additional amounts may be retained if the job is not proceeding satisfactorily.

(k) *Other compliance requirements*. Contracts in excess of \$100,000 shall contain a provision which requires compliance with all applicable standards, orders, or requirements issued under section 306 of the Clean Air Act (42 U.S.C. 1857(h)), section 508 of the Clean Water Act (33 U.S.C. 1368), Executive Order 11738 (3 CFR, 1974 Comp., p.209), and Environmental Protection Agency (EPA) regulations 40 CFR part 15, which prohibit the use under non-exempt Federal contracts, grants or loans of facilities included on the EPA List of Violating Facilities. The provision shall require reporting of violations to the Agency and to the U.S. Environmental Protection Agency, Assistant Administrator for Enforcement.

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Solicitations and contract provisions shall include the requirements of 4 CFR 15.4(c) as set forth in RUS Bulletin 1780-14.

### § 1780.76 Contract administration.

Owners shall be responsible for maintaining a contract administration system to monitor the contractors' performance and compliance with the terms, conditions, and specifications of the contracts.

(a) *Preconstruction conference.* Prior to beginning construction, the owner will schedule a preconstruction conference where the consulting engineer will review the planned development with the Agency, owner, resident inspector, attorney, contractor, and other interested parties. The conference will thoroughly cover applicable items included in Form RD 1924-16, "Record of Pre-construction Conference," and the discussions and agreements will be documented.

(b) *Monitoring reports.* The owner is required to monitor construction and provide a report to the Agency giving a full explanation under the following circumstances:

(1) Reasons why approved construction schedules were not met;

(2) Analysis and explanation of cost overruns and how payment is to be made for the same; and

(3) If events occur which have a significant impact upon the project.

(c) *Inspection.* Full-time resident inspection is required for all construction unless a written exception is made by the Agency upon written request of the owner. Unless otherwise agreed, the resident inspector will be provided by the consulting engineer. Prior to the preconstruction conference, the consulting engineer will submit a resume of qualifications of the resident inspector to the owner and to the Agency for acceptance in writing. If the owner provides the resident inspector, it must submit a resume of the inspector's qualifications to the project engineer for comments and the Agency for acceptance in writing prior to the preconstruction conference. The resident inspector will work under the technical supervision of the project engineer and the role and responsibilities will be defined in writing.

(d) *Inspector's daily diary.* The resident inspector will maintain a record of the daily construction progress in the form of a daily diary and daily inspection reports. The daily entries shall be made available to the Agency personnel and will be reviewed during project inspections. The original complete set will be furnished to the owner upon completion of construction. RUS Bulletin 1780-18 is available from the Agency for preparing daily inspection reports or the reports can be provided in other formats approved by the State staff engineer.

(e) *Payment for Construction.* Form RD 1924-18, "Partial Payment Estimate," or other similar form may be used for construction payments. If Form 1924-18 is not used, prior concurrence by the State staff engineer must be obtained.

(1) Payment of contract retainage will not be made until such retainage is due and payable under the terms of the contract.

(2) Invoices for the payment of construction costs must be approved by the owner, project engineer and concurred in by the Agency.

(3) The review and acceptance of project costs, including construction payment estimates by the Agency shall not attest to the correctness of the amounts, the quantities shown, or that the work has been performed under the terms of agreements or contracts.

(f) *Prefinal inspections.* A prefinal inspection will be made by the owner, resident inspector, project engineer, contractor, representatives of other agencies involved, and Agency representative (preferably the State staff engineer or designee). The inspection results will be recorded by the project engineer and a copy provided to all interested parties.

(g) *Final inspection.* A final inspection will be made by the Agency before final payment is made.

(h) *Changes in development plans.* (1) Changes in development plans shall be reviewed and approved by the Agency provided:

(i) Funds are available to cover any additional costs; and

(ii) The change is for an authorized loan or grant purpose; and